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SHOULD THE SUBMARINE BE USED IN WARFARE UPON COMMERCE?*

NOT the least difficult of the questions that will clamor for solution after the European war will be the amendments to the laws of war rendered necessary by the invention of new weapons or the unimagined use of instruments originally devised for other purposes.

The great struggle has witnessed the introduction into warfare of many new instrumentalities of transportation, of the scout, of the attack and the defense. Great strategic lines of railway, the automobile, the motorcycle, the motor boat, the wireless, have almost annihilated distance; the aeroplane and airship have, for scouting purposes, relegated the cavalry arm to the background, if not quite sealed its doom, and in addition have become familiar and fearful weapons of attack; jets of scorching flame and death dealing gases now sear and destroy the human units which might withstand the furious storm of shot and shell pouring from the guns of all calibres that lie thick as leaves that fall in Vallombrosa.

All these dread devices are being used by the belligerents, and doubtless are causing suffering incommensurate with the advantages gained by their use. When the war is over, and the eye of the expert soldier may calmly review the goals sought in particular instances, comparing the results of the methods used with those that might have been attained by less ruthless

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means, it will no doubt be found that needless cruelties have been practiced, and an international conference will find ways to ameliorate these new evils as they have others in the past.

The task to which I have addressed myself, however, is more restricted in its scope. I am to deal as briefly as possible with the *post bellum* rules, if any, that should be incorporated into the laws of maritime warfare touching that new and dreaded monster of the deep—the submarine; especially with reference to its treatment of, and by, enemy and neutral merchant vessels.

To obtain a clear conception of the problems involved, it will be well concisely to review, first, the principles of maritime warfare upon commerce recognized before the present war; second, the nature of the submarine, and those characteristics which differentiate it from all other war vessels; and third, the extent, if any, to which this differentiation should cause a corresponding modification in the existing rules of maritime warfare.

I.

Prior to this war, international law had not been confronted with the possibility of any belligerent ship attacking another except upon the surface of the water, under circumstances in which the attacking ship could be discerned at a considerable distance, its nationality determined before a shot might be fired, and its nature as a ship of war or a commercial vessel ascertained in time for the master of the threatened boat to decide upon measures of defense, escape or submission.

It was the recognized right of the master of a merchant vessel on the high seas in war time, whether the vessel belonged to a belligerent or a neutral nation, whenever he might see a suspicious smudge of smoke on the horizon, to select either of three alternatives. He might, first, seek to escape capture or visit and search by putting on all speed, and perhaps with the aid of friendly darkness evade the possible pursuer. Or, second, he might determine that attempt at escape or resistance would be useless, and that it was his duty to submit passively to the capture or the visit and search. Or, third, he might place himself in a posture of defense, and await the coming of the

nearing vessel. If, upon its closer approach, he should find it a strong war vessel, practical considerations would prevent him from attempting a battle with only the small calibred guns which he would be likely to carry for defensive purposes, which, however useful against attacks by ill-armed vessels like pirates, privateers, or converted passenger vessels, would avail nothing against the heavily armored and strongly armed cruiser or battleship.

Practical considerations, I say, would usually prevent such a conflict, but no rule of international law would have prohibited it, unless it be counted such a prohibition that the law would justify the war ship under such conditions in using all the force needful to subdue resistance (but no more), or that the law would permit such resistance, in the case of a *neutral* merchantman, to be penalized by the condemnation of the vessel itself. In case of an *enemy* merchant vessel, such condemnation would of course result, whether there was resistance or not.

On the other hand, the pursuing ship, instead of being a heavily armed battleship, might turn out to be a privateer or a lightly armed converted cruiser, so that conceivably the merchant vessel might have a chance of waging a successful combat, perhaps even of sinking the attacking vessel by some lucky shot.

But the proposition had never been advanced prior to the present war that a lightly armored war vessel would be justified in sinking or in any manner injuring a merchant ship, whether flying an enemy or a neutral flag, which as yet had shown no signs of resistance, merely because of the possibility that it might use defense guns, which might sink the war ship. The presumption was conclusive that the war vessel would be sufficiently strong to overcome and render useless any defense. If not, so much the worse for the attacking party. He was not permitted to make the merchantman's possible strength the excuse for a surprise attack.

Again, while the law recognized that conditions might arise in which it might be necessary to destroy an enemy prize, without bringing it and its cargo into port for condemnation, it was yet recognized that the decision of the prize court was the main reliance of the law to prevent illegal captures of ship or cargo,

and to that decision the production of the ship's papers is essential, so that the practice of destroying even *enemy* ships was viewed with strong disfavor and sought to be confined to the narrowest possible limits. And especially to be condemned was the destruction of the documentary evidence along with the ship. On the other hand, the destruction of *neutral* prizes has never received the sanction of international law.

The law also demanded inexorably that no prize should under any conditions be destroyed until crew and passengers had been placed in safety, unless the vessel were destroyed in fight or in flight. Nor was any difficulty to be anticipated on this score, since there would always be accommodations of a sort for them aboard the attacking vessel. They need never be exposed in small boats to the perils of the sea.

This brief summary shows that the *ante bellum* system of international law, as it applied to the visit and search or the capture or destruction of merchant vessels, followed closely the lines dictated by humanity and justice. The attacking ship and its government were subjected in every case to a strict responsibility because its acts would all be done in the open, with the full knowledge of every person upon both vessels, and the legality of those acts would be tested under the scrutiny of a prize court.

II.

Our next inquiry must be whether the nature of the submarine is such as to permit it to fit into this *ante bellum* system of law, without unduly undermining its foundations. If not, then the use of such boats in future warfare on commerce can only be justified by showing that such use may be so regulated as not to violate the principles of law and humanity already established.

The submarine, as first devised, was intended as an instrument of attack upon war vessels and had before the present conflict, I believe, never been thought of by any expert in international law as a possible weapon of offence against commerce. Indeed, its very structure forbade such use of it under existing rules of law.

It could not carry enough men to furnish crews to take prizes

into port, and hence would be compelled to destroy them all. At the same time it was too small to harbor any considerable number of refugees from a doomed vessel, so that passengers and crew would be obliged to seek safety in open boats upon rough and treacherous seas.

It must necessarily be lightly armored, and a small calibred gun might work its destruction. The guns carried by merchant vessels for defense purposes might easily sink it. Even a rifle bullet might destroy its periscope, without which it would not only be blind and useless for attack, but would be in serious danger of ultimate destruction. And when it is considered that under existing law a warship was not permitted to fire upon a merchantman except in fight or flight, but must await its attack, it is not surprising that no one versed in the principles of *ante bellum* international law imagined the possibility of submarine warfare on commerce.

Again, the submersible, at least as developed before this war, was not a fast boat even on the surface of the water, and could be outdistanced by many, if not most, merchant vessels. This would usually necessitate a secret approach under the water, so that upon making its appearance it would be so close as not easily to admit of its victim's escape. Thus, in many cases, a merchant ship which, if it had known of a war vessel's approach, might have succeeded in escaping, would be forced instead to stand and fight or else submit. And the temptation to resist would be the greater, since the submarine, not carrying heavy guns, must usually show itself within range of the merchantman's guns, enhancing the chances of destruction alike to itself and to the vessel pursued.

It is thus seen that, under the rules and theories of maritime capture as they existed before the war, the submarine was not adapted to warfare against merchant vessels.

Those rules demanded open warfare, with a corresponding responsibility for illegal conduct, and a superior strength on the part of the war vessel that must not exert itself in violence until actually attacked or until an attempt be made to flee. They demanded that enemy prizes, save in rare instances, and neutral prizes invariably, be brought into port, so that the legality of

the capture both as to ship and cargo might be duly investigated by a prize court. And they particularly demanded that the safety of passengers and crew of captured vessels be in all cases provided for.

Submarine warfare on commerce fails to measure up to a single one of these standards. Its attacks are secret and by surprise, not open and public, so that it is difficult to fix responsibility upon the operators of such a boat should they desire to conceal the truth; instead of strength superior to its intended victim, it is in some respects more vulnerable; it cannot with safety await an attack even from guns of small calibre, so that the temptation would always be strong not only to dispense with the important requirement of visit and search, but to attack and sink the merchantman without warning. Even if it resists this hideous temptation, it is obliged to destroy its prizes, since it cannot spare men from its small crew to run the prize into port for condemnation; and when it does destroy the prize, it has no means of assuring the safety of passengers and crew.

III.

Our next inquiry is whether changes may properly be made in existing rules which would relieve the submarine of the disabilities under which it now labors.

It has been suggested that a prohibition upon merchant vessels to arm for defense would cure the difficulty and would at once admit submersibles to a legal participation in warfare on commerce. But would it have this effect?

In the first place, it would deprive the mercantile marine of every nation in time of war of the now admitted right to defend itself not only against submarines, but also against privateers and auxiliary cruisers, however weakly they might be armed. A little motor boat with a single small gun might thus hold at its mercy the largest and most powerful merchant ships, playing havoc with neutral as well as enemy commerce. Surely it is not unreasonable to demand that, if a belligerent is to be permitted to put trade to a violent death, the real force behind the violence must be adequate to awe the victim into submission, and not such as merely to tempt to resistance.

Nor would the disarmament of merchantmen prevent the danger to the submarine that would result if its victim should seek to ram and sink it, for the submersible is as liable to destruction in that mode as by gunfire. Hence logically, the amendment of the law must extend to a prohibition of any attempt to ram the submarine as well as to a prohibition to carry guns.

But even this would not suffice. The danger to the submarine, upon approach, would be so great that it would be unreasonable to expect its commander to put entire faith in the good dispositions of his opponent. On the contrary, he would be suspicious of any movement that might indicate a hostile intent and, however mistaken in his belief, he would feel himself justified, and his country would justify him, in immediately sinking the suspected ship. Hence, besides prohibiting the carrying of guns and attempts to ram the submarine, our amendment should logically prohibit also the merchant vessel to engage in any suspicious movements whatever.

Into such absurdities are we betrayed when we desert the principle, established by long experience, that the burden legally lies upon him who seeks to use force against non-combatants or inferior foes to possess the force necessary to overcome all resistance and to render it useless, as appears in the requirements that a blockade, to be valid, must be effective, that invaded territory cannot be legally "occupied" by mere flying columns, and that in war upon savages there should be an opposing force sufficient to overawe resistance.

The proposed amendment would reverse this wise principle and, instead of demanding that for a legal use of force the attacker shall be so strong as to render resistance useless, would demand that upon the party attacked shall rest the duty of being so weak as to be incapable of resistance.

Even if these objections to the disarmament of commercial vessels be disregarded, we would be confronted with the principle of law that when a right is being legally exerted by force, no greater violence shall be used and no greater injury or destruction wrought than is essential to attain the desired goal.

War is destructive enough of world capital, even when conducted upon lines the most civilized, and it would be deplorable

if the laws of war were altered in the direction of greater destructiveness. But if we admit this amendment and grant that the submarine may without danger to itself make prize of merchant vessels, we would be deliberately consigning every such prize and its cargo to destruction, since there is no means by which it might be carried into port and conserved as part of the world's capital. And when we remember that there can be no practical guarantee of the safety of the passengers and crew, the amendment stands still further condemned.

Should all these objections be in some way obviated, there would yet remain perhaps the greatest of all. It is none too easy, even under existing rules, to restrain belligerents, inflamed by the passions of war, within the limits that humanity and civilization demand. The adoption of the proposition to disarm merchantmen would make it easy for an unscrupulous adversary secretly to creep upon a defenseless victim and destroy it, without even giving such of the passengers or crew as might escape death the opportunity to know the cause of their disaster. No more deadly weapon for a treacherous belligerent could be devised. By means of it he might be guilty of any illegal attack he might choose to make, and yet leave in doubt the cause of the catastrophe.

If it be argued that a surface war vessel might be equally guilty of violations of humanity and the laws of war, it may be replied that the illegal attack would in such case be an open one, known at once to all concerned, and, through the wireless or the escape of persons on board the doomed vessel, there would be a chance that the disgraceful facts might become known to the world. This would serve as a very considerable check upon such illegal acts. Moreover it would usually be feasible for a surface vessel to bring the prize into port, in which event the captain of the war vessel would find it difficult to explain to his own government why he has permitted his passions so to overcome his judgment as to deprive his country, through an unnecessary destruction of the prize, of the pecuniary and commercial benefits of the capture.

Thus, while necessity and temptation might unite to induce submarines to destroy unarmed merchant ships without warning

or excuse, both necessity and temptation would usually be wanting in the case of other war vessels.

These theoretical conclusions are fully sustained by the practice in the present war. There is no instance, I believe, in which a surface war vessel of any belligerent, meeting merchantmen, whether enemy or neutral, on the high seas has failed to obey the dictates of humanity in the capture. True such prizes have been destroyed, but only under circumstances of necessity, and never without removing passengers and crew to places of safety. On the other hand, the submarine warfare on commerce has presented a long list of attacks without warning, hundreds of innocent non-combatants and even neutrals being sent suddenly to their deaths, or at the most, given time only to take to boats, with little concern whether they might find a watery grave.

In some cases neutral vessels have been blown up under circumstances that engendered grave suspicion of submarine activity, though responsibility therefor has never been acknowledged by any belligerent government, so that the injured nation, though neutral, has been left no alternative save to submit to the outrage for the want of positive proof.

If then the submarine cannot be adapted to warfare on commerce through the disarming of merchant ships, the only other alternative would seem to be so to strengthen the submarine as to make it impervious to the defensive attack of a commercial vessel, as are other war ships; and at the same time by enlargement of the submersible itself or by some other device to enable it to bring in prizes and to guarantee the safety of persons on board. But these are questions of submarine construction, not of international law. Indeed, even though such improvements are in time perfected, there would yet remain the fatal objection that the submarine, through its power of secret approach and attack, possesses and furnishes to its government an immunity from responsibility, which it would be in the highest degree impolitic to concede.

To summarize the conclusions reached:

International law legalizes the use of armed force against merchant vessels, but only on certain conditions—amongst others,

(1) that the force brought to bear be reasonably adequate to overcome and render useless all resistance; (2) that the attack be an open one, for the legality of which the country to which the attacker belongs can be made to assume full responsibility; (3) that due precautions be taken for the safety of innocent non-combatants; and (4) that prizes be brought in for condemnation, and not destroyed save in rare instances, and only when the prize is enemy, not neutral.

As has been shown, the submarine, by reason of its very structure, is unable to meet any of these indispensable conditions. And not only are these conditions indispensable under existing rules of international law, but it would be impossible to modify them without violating some of the most fundamental principles upon which that law is based and taking backward steps toward pristine conditions of barbarism.

If then the question be asked, "What rules should govern the conduct of submarines in warfare upon commerce," the only possible answer would seem to be, "There must be *no* submarine warfare on commerce."

It would follow that a submarine ought to be prohibited to approach or pursue a merchant vessel, whether enemy or neutral, on the high seas, unless itself in distress or to relieve distress, in either of which cases its mission would protect it from attack. Under other circumstances its approach would lay its motives open to such suspicion as would justify an attack upon it by the merchantman in self-defense—an attack which it would have brought upon itself and to which it would not be justified in replying.

It should be made the first duty of a submarine to remain at a safe distance from all alien commercial bottoms on the high seas, and any belligerent act on its part against a merchantman, enemy or neutral, ought to raise a strong legal presumption of the criminal responsibility of the submarine's commander and his government.

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